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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ANTHONY J. SCHERER, JR.,
Petitioner,

vs.

THOMAS BRENNAN and NICK NOACK,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes Anthony J. Scherer, Jr., Plaintiff-Appellant, below, by his duly authorized attorneys, Julius L. Sherwin and Theodore R. Sherwin, and prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered June 21, 1967 (App. B), Rehearing denied July 14, 1967 (App. C).

In support of this petition your petitioner respectfully shows:

OPINION BELOW

The District Court did not prepare or publish an opinion. The opinion of the Court of Appeals for the Seventh Circuit is reported in 379 F. 2d 609.

Petition for rehearing was denied on July 14, 1967. No opinion was rendered on the Petition for Rehearing.

JURISDICTION

This Court's jurisdiction is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 928, Title 28 U.S.C. §1254.

QUESTIONS PRESENTED FOR REVIEW.

Are Federal Agents, assigned to protect the President of the United States and directed in that assignment to "keep under surveillance" the plaintiff, acting within or beyond the scope of their authority when they enter upon plaintiff's property, refuse to permit him to enter and occupy his residence on that property and tell him that he must sleep in a motel and not in his own home?

Do Federal Agents assigned to protect the President of the United States have the right without a warrant or without legal process of any kind the right to deny a citizen his right to enter his residence and occupy his home and sleep in his own bed or must such a private citizen be permitted to enter his residence only if accompanied by federal agents or must he spend the night as ordered by these agents in a motel room, if he does not permit the agents to enter his home with him?

Do Federal Agents assigned to protect the President of the United States have official immunity from a suit by a

citizen for their trespass on his property, interfering with and denying his right to have access to and possess and occupy his place of residence, during the President's stay at a motel in the vicinity of plaintiff's residence?

STATEMENT OF THE CASE.

Petitioner seeks a reversal of the judgment of the Court of Appeals for the Seventh Circuit entered June 21, 1967 affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered September 22, 1966, in favor of the respondents and against the petitioner on respondents motion for summary judgment.

The original action was commenced by petitioner's filing of his complaint at law in the Circuit Court of Cook County, Illinois on April 19, 1966, against the respondents, Thomas Brennan and Nick Noack (App. 5, 7-10).

The complaint seeks damages in the sum of $100,000.00 by reason of respondents unlawful trespass on plaintiff's real property and for their wrongful and unlawful interference with plaintiff's right to have access to and to possess and occupy his residence on that property (App. 7-10). The respondents filed their petition for removal (App. 5-6) in the United States District Court for the Northern District of Illinois, Eastern Division. The jurisdictional basis for the removal was under Sections 1442 and 1446, Title 28 U.S.C. The removal petition alleged that the civil action arose out of incidents alleged to have occurred at a time when respondents were Special Investigators, of the Alcohol & Tobacco Tax Unit, Internal Revenue Service, United States Treasury Department and were acting under color of their office in connection with the protection of the President of the United States (App. 5-6).

Based upon Affidavits filed by respondents, the trial Judge allowed their Motion for Summary Judgment and entered judgment in favor of the respondents against petitioner (App. 31).

Petitioner's Complaint alleged that he was, at the time of the occurrence complained of, a duly licensed dealer under the National Firearms Act and the Federal Firearms Act. He was the owner and has his place of residence at 3010 Orchard Place, Des Plaines, Illinois and had the lawful right to enter upon the property owned by him and to occupy his property and place of residence free from any interference or restraint by any person.

On October 7, 1964, as he entered upon his property, an automobile was parked thereon in which two men were seated (App. 7). As he proceeded upon his property the men stepped out of the automobile, accosted petitioner and stopped him. One of these men was the respondent, Thomas Brennan, who identified the men as Agents of the Alcohol and Tobacco Tax Unit of the U.S. Treasury Department. Brennan told petitioner he could not enter his place of residence unless the respondent and the other agent entered the residence with him. Petitioner asked the respondent if he had a warrant for his arrest or a warrant to enter his place of residence. Brennan said that they had no warrant, but it did not matter, that they would enter petitioner's residence and keep him under their constant surveillance. Petitioner stated that he intended to enter his home and that Brennan, and the other man could not enter with him. Brennan told petitioner that he could not enter his home, he was to stay at a nearby motel and that the agents would be in the motel room with him, and that no matter where the plaintiff would be they would keep him under their constant surveillance at all

times. Brennan told the petitioner that they were assigned to guard the President, who was staying at the O'Hare Inn, a motel in the vicinity of the petitioner's residence. As long as the President was at the O'Hare Inn, they would keep petitioner under their constant surveillance. Petitioner told the agents that they had no right to be upon his property, no right to interfere with his entering into his own home. He told them to immediately remove themselves from his property. Petitioner further stated that he was going into his home and occupy it, as he had a right to do. Respondents refused to leave his property and refused to permit him to enter his home (App. 8).

Petitioner left his property and was followed by Nick Noack. Petitioner went to the home of a friend of his. Nick Noack entered the residence of petitioner's friend twice while petitioner was there (App. 9).

Petitioner left the residence of his friend, again followed by Noack and a man who was with Noack. When petitioner arrived at his property, he was followed on the property by Nick Noack and the other man. Petitioner made three or four efforts to open the door to his residence. In each instance the respondents, Brennan and Noack, prevented him from entering unless they entered with him. He again demanded that the agents immediately leave his property and cease trespassing on his property. The respondent, Noack wrongfully parked his automobile on the front lawn of plaintiff's residence and the defendant, Brennan, wrongfully parked his automobile at the rear of petitioner's property (App. 9).

Respondents filed an Answer and Motion for Summary Judgment together with supporting Affidavits. The Answer contained an affirmative defense alleging that the defendants, at the time and place of the events complained

of, and while performing those acts complained of, which are admitted herein, were in the scope of their official duties and under color of their offices as Special Investigators of the Alcohol and Tobacco Tax Unit of the Internal Revenue Service of the United States, Treasury Department, in connection with the protection of the President of the United States (App. 11).

Four affidavits were filed in support of the Motion for Summary Judgment. Two were affidavits of the respondents'. One was the affidavit of the Special Agent-in-Charge of the United States Secret Service, and that of the Acting Chief Enforcement Branch, Alcohol & Tobacco Tax, Internal Revenue Service, Treasury Department, Midwest Region, Chicago, Illinois. The affidavit of the Special Agent-in-Charge of the United States Secret Service stated that on October 7, 1964 at about 2:30 P.M. he called upon the Acting Chief of the Alcohol & Tobacco Tax, Internal Revenue Service, Treasury Dpeartment, Midwest Region, Chicago and advised him that President Lyndon B. Johnson, was scheduled to arrive at O'Hare Inn, that same evening and requested assistance of his investigators in "keeping under surveillance the occupant or occupants of a house in the vicinity, located at 3010 Orchard Place, DesPlaines, Illinois, until the President departed from the Chicago area." The affidavit of the Acting Chief of the Alcohol and Tobacco Tax Division acknowledged the call from the Special Agent-in-Charge of the United States Secret Service and stated that in response to this request, he instructed the respondents and two other investigators to assist in the Presidential protection assignment and "particularly to keep under surveillance the occupant or occupants of a house located at 3010 Orchard Place, Des Plaines, Illinois."

The affidavit of the respondent, Brennan, admitted that petitioner was a dealer in firearms under the Federal Firearms Act and had a special tax stamp as a dealer in machine guns and other weapons coming under the purview of the National Firearms Act (App. 18). His affidavit further states that he, Brennan, accompanied by a special investigator, drove to plaintiff's residence arriving at about 4:30 P.M. and parked their automobile in the parking area at the rear of plaintiff's residence.

> "At about 6:00 P.M. Special Investigators Nick S. Noack and David Finney joined us at the Scherer residence. Noack and Finney then went to the nearby Flying Carpet Motel to engage a room which had been reserved for our use.
>
> At about 6:30 P.M. Scherer drove up in a red Mercedes Benz Taxi. I introduced Scherer to Special Investigator Healey and told Scherer that we had been instructed to deny him access to his firearms while the President was a guest at the O'Hare Inn." (App. 16).
>
> • • •
>
> "We again asked Scherer to either permit us to enter his residence, to take custody of his firearms or to leave the area and take advantage of our offer of a motel room at the Flying Carpet Motel. We asked that he remain away from his firearms until the President departed. Scherer again declined." (App. 16-17).

Brennan thereafter had a telephone conversation with Scherer's attorney, Sherwin, who told him it was his duty to inform his client that government officers had no legal right on his premises (App. 17).

Scherer, having left his property, returned with one, Donald Yabush, a reporter for the Chicago Tribune.

Brennan's affidavit further states:

> "I again attempted to persuade Scherer to spend the night at the Flying Carpet Motel or to permit

> us to take custody of his firearms. Again Scherer refused. Then Scherer stood at the rear doorway of his home and asked me on several occasions if I intended to follow him into his house if he entered the house. I replied that I felt it was my duty to do so. Then, at the suggestion of Reporter Yabush, Scherer informed me that his civil rights were being violated." (App. 18).
>
> * * *
>
> "Scherer again returned to the doorway and repeated his demand that the investigators leave his property and permit him to enter his residence. I again asked Scherer to accept our proffered offer of the motel room at the Flying Carpet Motel or be permited to take custody of his firearms. Again he refused. Reporter Yabush then suggested to Scherer that he call the police or the Sheriff's office and ask them to remove the investigators from his premises. Scherer asked Yabush to call his office on his two-way radio and ask them to call the Sheriff of Cook County." (App. 18).

Respondent Noack's affidavit states that he was directed by his superior to proceed with another investigator to the residence of petitioner at 3010 Orchard Place, Des Plaines, Illinois and to keep the occupant or occupants of this house under surveillance until the President of the United States departed from the Chicago area (App. 20).

At 6:00 P.M. on October 7, 1964 he joined respondent Brennan and another agent at Scherer's residence. He parked at the rear of the residence and found petitioner in conversation with the respondent Brennan and another agent. He heard them urge petitioner to spend the night at the Flying Carpet Motel, while the President was at O'Hare Inn. Petitioner refused (App. 21).

Petitioner left his residence accompanied by friends followed by respondent Noack. After remaining at the

residence of the friends petitioner left accompanied by a Chicago Tribune reporter Yabush. He then returned to his residence followed by respondent Noack and another agent (App. 22).

When Scherer arrived back at his residence Brennan again attempted to persuade him to spend the night at the motel and again Scherer refused. Noack accompanied Scherer and reporter Yabush to a restaurant where Scherer was going to call the Sheriff of Cook County. At the restaurant Scherer engaged in a conversation with the reporter who asked him if he really had a cannon. Scherer replied that he did, that the ammunition for it was packed away and he did not know if the cannon would shoot because he had not tried it. Scherer and the reporter then left to go back to Scherer's residence. They were followed closely by respondent Noack and another agent. The reporter drove at an unreasonable speed followed closely by the agents. When the vehicle in which Scherer was riding arrived at Scherer's residence he leaped from the vehicle ran past the front entrance to the south side of his residence where he jumped into a first floor window, closing and locking the window after his entrance. Respondent Noack and the other agent parked their car in front of Scherer's residence where they remained until 1:30 A.M. on October 8, 1964, when they were relieved by Secret Service Officers (App. 23-24).

Petitioner filed a reply stating that the allegations of the affirmative defense constitute the pleading of a conclusion of law. The reply further denied that the respondents acted within the scope of their official duties and alleged the fact to be that the acts of the respondents were beyond the scope of their authority (App. 24).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT, NAMELY: THE EXTENT OF THE AUTHORITY OF SPECIAL AGENTS ASSIGNED TO PROTECT THE PRESIDENT OF THE UNITED STATES. DOES THAT AUTHORITY INCLUDE THE RIGHT OF SUCH AGENTS ACTING SOLELY ON ORDERS OF THEIR SUPERIORS AND WITHOUT JUDICIAL PROCESS OF ANY KIND TO BAR A CITIZEN FROM OCCUPYING HIS RESIDENCE BECAUSE THE PRESIDENT IS STAYING IN A MOTEL IN THE VICINITY OF THAT CITIZEN'S PLACE OF RESIDENCE.

The ruling below that respondents under assignment to protect the person of the President acted within the scope of their authority in barring petitioner from his residence and telling him that he must occupy a motel room away from his residence is not supported by any authority. It has become standard practice when a federal agent or employee is sued, to have that person file an affidavit supported by the affidavit of his superior that his actions which are the subject matter of the suit were done within the scope of their authority. It must be conceded as a matter of law that a citizen of the State of Illinois and the United States has the right of free access to his property and the freedom to enter and occupy his residence without interference or being barred therefrom by third persons or federal agents. The ruling below overrules that fundamental right.

The direction to the respondents was "to keep under surveillance the occupant or occupants of a house in the vicinity located at 3010 Orchard Place, Des Plaines, Illinois until the President departed from the Chicago area." This was not authority to respondents to prevent the owner of the property from his right to go into his residence and to sleep in his own bed. Keeping petitioner "under surveillance" did not authorize the interference with his property rights and the right to the possession of his property. It did not authorize the respondents to tell the petitioner that he could not enter his residence unless they entered with him or that if he refused to permit them to enter the residence with him that he must accompany them to a motel where he must stay until the President departed the Chicago area (App. 18).

Camara v. *Municipal Court of City & Co. of San Francisco,* 87 S.Ct. 1727, was cited by us below in support of the proposition that the right of privacy, the right to possess ones home free from interference by federal agents is to be decided by a judicial officer and not by a government agent. The Court below distinguished this case on the basis that it was not concerned with the official immunity doctrine.

In *United States* v. *Lee,* 106 U.S. 196, 218, the assertion by officers of the government of their authority to act did not foreclose judicial inquiry into the lawfulness of their action. That a determination of whether their "authority is rightfully assumed is the exercise of jurisdiction and must lead to the decision of the merits of the question." An agent or officer of the United States who acts beyond his authority is answerable for his action.

This Court stated, with respect to the claim of governmental immunity (p. 220):

> "* * * the defence stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government, however clear it may be that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation."
>
> * * *
>
> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest are creatures of the law, and are bound to obey it."

In *Mitchell* v. *Harmony*, 54 U.S. 115, 134, this Court held that soldiers of the American Army acting upon orders of their superiors to seize personal property of the plaintiff were liable and that there was no defense of governmental immunity.

We assert that instructing the defendants to keep an occupant under surveillance does not include authority to prevent him from entering his home and the right to occupy his own bed.

In *Land* v. *Dollar*, 330 U.S. 731, 737, the holding of *United States* v. *Lee* was approved. This Court stated:

> "Where the right to possession or enjoyment of property under general law is in issue, and the defendants' claim as officers or agents of the sovereign, the rule of *United States* v. *Lee*, *supra*, has been repeatedly approved. (Citing cases.)"

The Court further stated that public officers became tort-feasors by exceeding the limits of their authority. The opinion states (at p. 738):

> "But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld."

In *Philadelphia Co.* v. *Stimson,* 223 U.S. 605, 619 the Court held that the exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property have unlawfully been invaded and *applies to a federal officer acting in excess of his authority.* That the suit under those circumstances rests upon an abuse of power, and its merits must be determined and it is not a suit against the United States.

This Court has the duty of giving effect to the right of the individual to freedom from unreasonable intrusion by those in authority by holding that an assignment to protect the person of the President cannot overrule the right of a citizen to be free to occupy his home unless that right is determined by a judicial officer at a proper hearing upon proper notice. *United States* v. *1013 Crates of Whiskey Bottles,* is here appropriate, 52 F. 2d 49-50 (C.A. 2, 1931):

> "Cases like this involve grave danger. The very natural desire of government officers who try to enforce the law to the best of their ability leads them to adopt the most practical and efficient way to do it whenever by some plausible reasoning they can satisfy

themselves that no constitutional rights are contravened. But their zeal for the cause in which they have enlisted so often creates in their minds such an emphasis upon the theory that the virtue in the end will justify the means that the fundamental rights of a liberty loving people will be gradually sapped, undermined, and finally destroyed by a subtle, insidious, and persistent narrowing of vital bedrock principles unless courts are steadfast and firm in the preservation of what has been gained through centuries of struggle."

Also appropriate is the language of the late Judge Jerome Frank quoted from his dissenting opinion in *On Lee* v. *United States,* 193 F. 2d 306, 315-316.

> "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle."

The right of the petitioner to enter and occupy and possess his home is an inalienable right of a citizen protected by the 5th Amendment. He cannot be deprived of this right in violation of the due process clause of this amendment. This right should not be denied to him on the basis of the "official immunity doctrine."

II.

THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT MISINTERPETS AND IS IN CONFLICT WITH THIS COURTS DECISION OF BARR V. MATTEO, 360 U.S. 564. TO PREVENT MISINTERPRETATION OF BARR V. MATTEO BY LOWER COURTS IT SHOULD BE OVERRULED. THE DOCTRINE OF GOVERNMENTAL IMMUNITY SHOULD BE LIMITED AND NOT EXPANDED.

The doctrine of governmental immunity has become more and more out of date as the powers of the government and its vast bureaucracy have increased. The trend in all of the states has been to limit this doctrine. This trend should be followed by this Court.

Barr v. *Matteo* as construed by the Court of Appeals approves as within the scope of their duties to protect the President of the United States actions of Government Agents in interfering with petitioner's right to have access to and to possess and occupy his place of residence. This notwithstanding the fact that these agents were instructed only to "keep [the plaintiff] under surveillance." If this construction is permitted to stand no citizen has the fundamental right to enter and occupy his home if the President decides to stay in the vicinity of his home and the citizen has arms in his home. As so construed entire blocks of homeowners in the area where the President may stay can be barred from their homes.

No lawful authority can be given by the Secret Service to any of its agents or those assisting these agents to bar citizens from their home. It is our position that respondents acted clearly beyond the scope of their authority to keep petitioner "under surveillance." Keeping plaintiff "under surveillance" was not authority to bar petitioner from his home. Their actions were not as decided by the Court of Appeals " . . . at least, 'within the outer perimeter' of their duties."

If this construction should stand citizens without notice, without a hearing, without a judicial determination, but solely at the whim of a federal agent of lowest rank are denied access to and the right to occupy their own home, and the right to sleep in their own bed. If *Barr* v. *Matteo* can be so misconstrued by the Court of Appeals it should be overruled or severely limited.

Is a citizen who is a licensed dealer under the National Firearms Act and Federal Firearms Act, with the right to have arms in his possession, and without any charge placed against him, and without any notice or hearing, warrant or process of any kind lawfully barred from his home by agents who are assigned to keep him "under surveillance." We think not.

The respondents could receive no lawful authority to bar plaintiff from his home from their superior. They were clearly beyond the outer perimeter of their authority in their actions against the petitioner.

The reasons for the vigorous dissents in *Barr* v. *Matteo,* 364 U.S. 564, become apparent. The dangers pointed to by Justice Brennan is his dissenting opinion have come to pass, as he stated at page 590:

> "To what extent does fear of litigation actually inhibit the conduct of officers in carrying out the public business? To what extent should it? Where does healthy administrative frankness and boldness shade into bureaucratic tyranny? To what extent is supervision by an administrator's superiors effective in assuring that there will be litle abuse of a freedom from suit? To what extent can the referral of constituent complaints by Congressmen to the executive agencies (already myraid in number and quite routinized in processing) take the place of actions in the courts of law in securing the injured citizen redress? Can it be assumed, as the opinion appears to assume, that an absolute privilege so broadly enjoyed will not be subject to severe abuse?"

The decision of the Court of Appeals should not stand.

What this Court said in *Silverman* v. *United States*, 365 U.S. 505, 511 applies directly to the decision of the Court of Appeals and to *Barr* v. *Matteo*:

> "What the Court said long ago bears repeating now:
>
> > 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.'
>
> *Boyd* v. *United States*, 116 U.S. 616, 635. We find no occasion to re-examine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch."

CONCLUSION

WHEREFORE, petitioner prays for the allowance of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in the case entitled *Anthony J. Scherer, Jr., Plaintiff-Appellant* v. *Thomas Brennan and Nick Noack, Defendants-Appellees*, No. 15961, in order that this case may be reviewed and determined by this Honorable Court.

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